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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 461

RUTH PAGE FISHER and THOMAS HART FISHER,
Petitioners,

vs.

PRINTING DEVELOPMENTS, INC., a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS, THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND THE MUNICIPAL COURT OF CHICAGO.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS, THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND THE MUNICIPAL COURT OF CHICAGO.

Petitioner, Ruth Page Fisher, respectfully prays this Court's writ of certiorari to review and reverse the decisions of the Illinois Supreme Court, the Appellate Court of Illinois, First District, and the Municipal Court of Chicago in this case. Petitioner, Thomas Hart Fisher, her co-party defendant in the trial court, and co-party appellant in the Appellate and Supreme Courts, joins in the petition.

CITATIONS TO OPINIONS BELOW.

There has been no opinion in the Illinois Supreme Court. The final judgment of the Illinois Supreme Court is reprinted in full as Appendix I to this petition.

The abstract of the opinion of the Appellate Court of Illinois, First District, is officially reported in 17 Ill. App. (2d) 553. This abstract, followed by the opinion in full, is reprinted as Appendix II to this petition.

The opinion of the Municipal Court of Chicago is not officially reported. It is reprinted in full as Appendix III to this petition. The final judgment of the Municipal Court of Chicago is reprinted in full as Appendix IV to this petition.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The opinion of the Illinois Appellate Court, First District, was filed and its judgment was rendered on May 28, 1958. Petitioners' timely Petition for Rehearing was denied on June 20, 1958. The judgment of the Supreme Court of Illinois denying Petitioners' timely Petition for Leave to Appeal was denied on September 16, 1958.

This Court's jurisdiction is invoked under Section 1257(3) of the United States Judicial Code (U.S.C.A., Title 28, Sec. 1257(3)) which confers upon this Court jurisdiction to review by certiorari decisions of the State Courts of last resort "where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States."

THE QUESTIONS PRESENTED FOR REVIEW.

The questions presented for review are:

(1) Was Petitioner, Ruth Page Fisher, deprived of due process of law under the 14th Amendment to the Federal Constitution by the entry of the void judgment of the Municipal Court of Chicago in a forcible detainer action for possession of real estate, such judgment being that Respondent here (plaintiff below) "have and recover" from her "possession of the premises" and that a writ of restitution issue against her therefor (Abst. 7), which judgment for possession was void because the Court never had jurisdiction over her since she was never served with process in the action, was never summoned in accordance with the Illinois Statute for substituted service, never filed any answer or made any appearance in the trial court, was never defaulted, and never took any part in the proceedings until after the void judgment had been entered, when she filed a Notice of Appeal from the void judgment to the Illinois Appellate Court, First District?

(2) Was Petitioner, Ruth Page Fisher, deprived of due process of law under the 14th Amendment to the Federal Constitution by the entry of the void money judgment of the Municipal Court of Chicago against her for costs in favor of Respondent (as plaintiff below) in said forcible detainer action, such money judgment being void for the reasons stated in question (1) above?

(3) Was Petitioner, Ruth Page Fisher, deprived of due process of law under the 14th Amendment to the Federal Constitution by the judgment of the Illinois Appellate Court, First District, which affirmed the void judgment of the Municipal Court of Chicago against her for possession of the premises sued for in the forcible entry action and granted a writ of restitution therefor, and for a money judgment for costs against her in such action?

(4) Was Petitioner, Ruth Page Fisher, deprived of due process of law under the 14th Amendment to the Federal Constitution by the judgment of the Supreme Court of Illinois denying her Petition for Leave to Appeal from the judgment of the Appellate Court of Illinois, First District, which affirmed the void judgment of the trial court?

As shown in the Argument below, this is a case in which a void judgment in a state trial court has been affirmed on appeal to the state court of last resort, upon the ground that the defendant against whom the void judgment ran had validated the void judgment, *after it was rendered*, merely by filing a notice of appeal to the upper appeal court. The basic question is, therefore, whether the defendant (Petitioner here) has been thereby deprived of due process of law under the 14th Amendment to the Federal Constitution, in the sense that she has been subjected to a void judgment to which she has never assented, unless her taking an appeal from the void judgment be deemed such an assent.

THE STATE STATUTE INVOLVED.

The State Statute involved is Paragraph 403 of the Municipal Court of Chicago Act (Illinois Revised Statutes, State Bar Association Edition, 1957, Chapter 37, Section 403), which provides in relevant part as follows:

> "(b) If the plaintiff, his agent or attorney, shall file in any . . . forcible detainer suit an affidavit stating that the defendant . . . on due inquiry cannot be found, . . . and also stating the place of residence of the defendant, if known, . . . if the case be a forcible detainer case and no claim for rent is joined with the complaint for possession, *the defendant may be notified by posting and mailing of notices as hereinafter provided in this section;* . . .

(c) . . . Whenever notice by posting is required or proper to be given to any defendant, said notice shall be in the name of the clerk of the court, be directed to the defendant, shall state the nature of the process against the defendant and at whose instance issued, . . . the time and place for trial, and shall also state that unless said defendant shall appear at the time and place fixed for trial, judgment will be entered by default, and shall also state the character of the judgment that will be rendered in said cause and of the execution that will be issued thereon, three copies of which notice the bailiff shall post in three public places in the neighborhood of the court where said cause is to be tried, at least ten days prior to the date set for the trial, *and if the place of residence of the defendant is stated in any affidavit on file, the bailiff shall at the same time mail one copy of the notice addressed to such defendant at such place of residence* and on or before the day set for trial said bailiff shall file said notice with an endorsement thereon stating the time when and places where he posted and to whom and at what address he mailed copies as herein required. *For want of sufficient notice any cause may be continued from time to time until the court has jurisdiction of any defendant.*" (Italics added.)

The official citation of the foregoing statutory provision is "An Act in relation to a Municipal Court in the City of Chicago. [Approved May 18, 1905. L. 1905, p. 157. Adopted at the election held November 7, 1905.]"

Petitioner also directs the Court's attention to Section 18 of the Illinois Forcible Entry and Detainer Act (Illinois Revised Statutes, State Bar Association Edition, 1957, Chapter 57, Section 19), which provides in relevant part as follows:

"If any party shall feel aggrieved by the verdict of the jury or decision of the court, upon any trial had under this Act, such party may have an appeal,

to be taken to the same courts, in the same manner, and tried in the same way as appeals are taken and tried in other cases. *Provided such party files notice of appeal and bond within five (5) days from the rendition of the judgment, and no writ of restitution shall be issued in any cases until the expiration of said five (5) days. . .*" (Italics added.)

Petitioner further directs the Court's attention to Section 68.3 of the Illinois Civil Practice Act (Illinois Revised Statutes, State Bar Association Edition, Chapter 110, Section 68.3) which provides:

"(1) In chancery cases and in cases at law tried without a jury, any party may, within thirty days after the entry of the decree or judgment, file a motion for a rehearing, or a retrial, or modification of the decree or judgment or to vacate the decree or judgment or for other relief. *Neither the filing of nor the failure to file a motion under this section limits the scope of review.*" (Italics added.)

The parallel Section 68.3 of Rule 1 of the Municipal Court of Chicago is substantially identical to the foregoing Section 68.3 of the Illinois Civil Practice Act, and is identical insofar as the last sentence is concerned.

STATEMENT OF THE CASE.

Respondent (as plaintiff) sued Petitioner, Ruth Page Fisher (as a defendant), in a forcible detainer action for possession of real estate located in the City of Chicago, such action being filed in the Municipal Court of Chicago (Abst. 1-3). Petitioner, Thomas Hart Fisher, was also made a co-defendant in said action. He appeared at the trial before the court without a jury and participated therein.

As the Illinois Appellate Court's opinion correctly states, Petitioner, Ruth Page Fisher, "was never served with summons, entered no appearance, and filed no answer" in the Municipal Court of Chicago. She was never brought into the case by substituted service in accordance with the Illinois statute, was never defaulted, never appeared at the trial, and never took any part in the proceedings in the Municipal Court prior to the final judgment against her. The Municipal Court obtained no jurisdiction over her to enter any judgment against her.

The record in this case conclusively shows on its face as to substituted service by mailing that Petitioner, Ruth Page Fisher, was never brought into the Municipal Court because the bailiff did not serve her with process and did not properly mail to her the notice required for substituted service under Section [illegible] of the Municipal Court Act above cited. This is established by the following facts:

The action was originally filed on June 27, 1956 in the Municipal Court (Abst. 1). The original summons issued on that date, together with the return thereon by the bailiff dated July 2, 1956, shows that Petitioners were "not found" in the City of Chicago, Illinois (Abst. 2). An alias summons issued on August 23, 1956 likewise shows by the bailiff's return thereon dated August 28, 1956

that Petitioners were "not found" in the City of Chicago, Illinois (Abst. 2). A second alias summons issued on September 13, 1956, together with the bailiff's return dated September 18, 1956, again shows that Petitioners were "not found" in the City of Chicago, Illinois (Abst. 2-3). There was, therefore, no personal service of process upon her.

Thereafter on October 9, 1956, Respondent's attorney filed an "Affidavit of Non-Residence", stating that Petitioners on due inquiry could not be found and that:

> "The place of residence of such defendants [Petitioners here] is *1235 North Astor Street,* Chicago, Illinois" (Abst. 3). (Italics added.)

The record further shows that although proper notices were posted in accordance with the Municipal Court Act, nevertheless the bailiff of the Municipal Court failed to comply with *the mailing provisions* of Section 403 of the Municipal Court Act requiring mailing of notice of the suit to defendants (Petitioners). The bailiff's affidavit stated as to mailing that:

> "I also on the same day [October 9, 1956] mailed postage prepaid at Chicago, Illinois, 1 copy of said Notice, addressed to said Defendants, Thomas H. Fisher and Ruth Page Fisher, *540 N. Michigan Ave.,* Chicago, Illinois." (Abst. 4.) (Italics added.)

This affidavit of mailing of notice to Petitioner, Ruth P. Fisher, was insufficient, under Section 403 of the Municipal Court of Chicago Act above quoted, *first,* because there was then on file an Affidavit of Non-Residence prepared and filed by Respondent (as plaintiff) stating that the place of residence of both Petitioners (as defendants) was *1235 North Astor Street,* Chicago, Illinois (Abst. 3), whereas the bailiff's affidavit showed that he had not mailed the notice to said residence address, but

had mailed the same to both Petitioners at *540 North Michigan Avenue,* Chicago, Illinois; and *second*, because there was no showing whatever that any notice mailed to both petitioners at 540 North Michigan Avenue, Chicago, Illinois would or could conceivably reach Petitioners, Ruth Page Fisher, nor is there any showing that she received any such notice. In fact, the record shows that the real estate premises in question were located at 540 North Michigan Avenue, Chicago (Abst. 5), but that neither of the Petitioners had resided at 540 North Michigan Avenue since November, 1953. The basement premises involved in this action for possession were used solely for storage purposes (Abst. 33).

There was, therefore, no proper substituted service upon her.

After a trial in the Municipal Court of Chicago, at which only Petitioner, Thomas Hart Fisher, appeared and participated, the Municipal Court rendered a judgment for possession of the premises against *both* Petitioners, together with a money judgment for costs against *both* Petitioners (Abst. 7). (Appendix IV, p. 11).

The judgment of the Municipal Court of Chicago was obviously void as to Petitioner, Ruth Page Fisher, for the reason that the Municipal Court of Chicago never obtained any jurisdiction over her, either in the manner provided by the statute for substituted service by mailing to her, or by personal service of summons upon her. Such void judgment thereby deprived her of due process of law and the equal protection of the laws under the 14th Amendment to the Federal Constitution, unless her subsequent appeal therefrom constituted a consent to be bound by such void judgment, as the Illinois Appellate Court held in its opinion.

Four days after the void judgment was rendered against her, Petitioner, Ruth Page Fisher, joined in a Notice of Appeal therefrom to the Illinois Appellate Court, First District (Abst. 8). The Appellate Court affirmed the void judgment of the Municipal Court, upon the ground that "By joining in the appeal in this [Illinois Appellate court she [Petitioner Ruth Page Fisher] submitted to the jurisdiction of the [trial] court", adding "and the attempt to raise the question of service of process comes too late" (Appendix II, p. 4). It was this affirmance in the Illinois Appellate Court which first raised the issue of due process under the 14th Amendment to the Federal Constitution (and under the Illinois Constitution). Petitioners promptly raised the constitutional issue in their application for leave to appeal to the Illinois Supreme Court, as we show below.

The Illinois Appellate Court's reasoning was that Petitioner, Ruth Page Fisher, "could have moved the [trial] court to vacate the judgment entered against her in the trial court during the thirty-day term" allowed by Illinois law under Section 68.3 of the Illinois Civil Practice Act, despite the fact that Section 18 of the Illinois Forcible Entry and Detainer Act required that all appeals in forcible detainer actions be taken within five days from the entry of a final judgment for possession of real estate, and despite the further fact that Section 68.3 of the Illinois Civil Practice Act *expressly provided* that failure to file a motion to vacate the judgment within 30 days would *not* limit the scope of review by appeal.

The judgment of the Illinois Appellate Court became final on June 20, 1958, whereupon Petitioners timely filed their Petition for Leave to Appeal to the Supreme Court of Illinois from the judgment of the Illinois Appellate Court which had affirmed the void judgment of the Muni-

cipal Court of Chicago. In the Petition for Leave to Appeal to the Illinois Supreme Court, Petitioner, Ruth Page Fisher, expressly raised and relied upon her constitutional rights under the due process clause of the 14th Amendment to the Federal Constitution, stating (p. 8):

> "The decision of the Appellate Court has deprived the Petitioner, Ruth Page Fisher, of her constitutional rights under both the due process clause of the 14th Amendment to the Constitution of the United States and under the Constitution of Illinois, Article II, Sections 2 and 5. No constitutional principle is more fundamental than the right of a person to receive due notice, by service of summons or the equivalent, and to be thereby given an opportunity to defend before a judgment goes against him. By affirming a void judgment for both possession and costs against a person who was never brought into the court below, the Appellate Court has violated the constitutional rights of that person."

The denial of the Petitioners' Petition for Leave to Appeal to the Illinois Supreme Court on September 16, 1958 confirmed the deprivation by the Appellate and Municipal Courts of the right of Petitioner, Ruth Page Fisher, to due process of law under the 14th Amendment to the Federal Constitution.

Petitioner, Thomas Hart Fisher, joins in this appeal for the reason that under Illinois law a judgment which is void as to an indispensable party defendant is also void as to other defendants. The complaint in the Municipal Court of Chicago shows that the Petitioner, Ruth Page Fisher, was an indispensable party in that it alleged that "defendants, or one of them, have unlawfully withheld and do now continue to withhold possession from plaintiff. . . ." (Abst. 2.), and the void judgment for possession and costs was a joint judgment against *both* defendants. Therefore, if the void judgment of the Municipal Court in this

case is reversed by this Court as to Petitioner, Ruth Page Fisher, the same joint judgment against Petitioner, Thomas Hart Fisher, must also be reversed for, under Illinois law, it must stand or fall as to both Petitioners. The fact that Petitioner, Ruth Page Fisher, was the wife of Petitioner, Thomas Hart Fisher, in nowise deprived her of the right to attack the void judgment against her for want of service of process, actual or constructive, upon her, under Illinois law.*

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* See **Robinson v. Robinson**, 329 Ill. App. 515.

ARGUMENT.

I.

NO JUDGMENT OF A COURT IS DUE PROCESS OF LAW UNDER THE 14TH AMENDMENT IF RENDERED WITHOUT NOTICE TO THE PARTY AGAINST WHOM THE JUDGMENT RUNS.

The judgment of the Municipal Court of Chicago involved in this case has two parts: *first,* a judgment for possession of real estate situated in the territorial jurisdiction of the court rendering the judgment and, *second,* a money judgment for costs. Both of these judgments ran against Petitioner, Ruth Page Fisher, as well as against Petitioner, Thomas Hart Fisher, as joint defendants in a forcible detainer action instituted against them by Respondent, Printing Developments, Inc., a corporation, as plaintiff, in the Municipal Court of Chicago.

The first constitutional question raised by this petition is whether Petitioner, Ruth Page Fisher, was deprived of due process of law under the 14th Amendment to the Federal Constitution by the failure of the Municipal Court of Chicago to obtain jurisdiction over her for the rendition of the foregoing judgment against her, and by the subsequent affirmance of such void judgment by the Illinois Appellate Court, and the failure of the Illinois Supreme Court to grant leave to appeal from and to reverse the lower courts.

The second constitutional question is whether the Illinois courts in this case have denied her due process of law, by entering, affirming and refusing to vacate a void judgment against her upon the ground that her appeal therefrom, after it was rendered, somehow validated the void judgment.

The Judgment for the Possession of Real Estate was Void as In Contravention of Federal Law.

Insofar as the judgment was a judgment for possession of real estate, Petitioner, Ruth Page Fisher, would obviously not have been deprived of due process of law if she had either been properly brought into the action by service of summons, or properly notified thereof under Section 403 of the Municipal Court of Chicago Act governing substituted service of process in forcible detainer actions in that Court (Ill. Rev. Stat., 1957, Chap. 37, Sec. 403). In other words, actual personal service of summons upon her would not be an essential element of due process of law, *provided* that she were properly notified of the pendency of the forcible detainer action in accordance with Section 403 of the Municipal Court of Chicago Act.

The record conclusively shows, as indicated in the Statement of the Case above, that there was no personal service of summons upon her (Abst. 2-3). The Illinois Appellate Court's opinion correctly found that Petitioner, Ruth Page Fisher, "was never served with summons, entered no appearance and filed no answer in the Municipal Court." In addition, it should also have found that she was never brought into the case by substituted service in accordance with the Illinois statute, and that she was never defaulted, never appeared at the trial and never took part in the proceedings prior to final judgment.

In order to obtain substituted service upon her, the bailiff was required to mail "one copy of the notice addressed to such defendant" at "*the place of residence of the defendant*" as "stated in any affidavit on file", all as provided in Section 403 of the Municipal Court of Chicago Act relating to notice by mailing to defendants in forcible detainer suits.

The record shows (Abst. 3) that on October 9, 1956, Respondent's own attorney filed an "Affidavit of Non-Residence", stating that Petitioner, Ruth Page Fisher's, place of residence was at 1235 North Astor Street, Chicago, Illinois.

The record further shows that the bailiff, instead of complying with Section 403 by mailing a copy of the notice to her at her "place of residence", to-wit, 1235 North Astor Street, Chicago, mailed no copy of the notice there, but actually mailed the copy of such notice to her at 540 North Michigan Avenue, Chicago (Abst. 4). This was the address of the premises involved in the action, which were used exclusively for storage purposes, and where it was plain that she would never receive the notice (and in fact she never did), since it was *not* her "place of residence." *There can be no question, therefore, that the Municipal Court never obtained any jurisdiction over Petitioner, Ruth Page Fisher, as defendant in the forcible detainer case for the purpose of rendering any judgment against her.*

The question whether a judgment of a court is due process of law, if rendered without notice to a party subjected to the judgment, was considered by this Court in the case of *Scott* v. *McNeal*, 154 U.S. 34. In that case the plaintiff owned certain lands of which he was deprived by a judgment of the Probate Court in the State of Washington in a proceeding purportedly administering the plaintiff's property as though the plaintiff were deceased, when in fact he was alive. This Court reversed the judgment of the Supreme Court of Washington in favor of the defendants in a subsequent action of ejectment brought by the plaintiff to recover possession of his property, upon the ground that the 14th Amendment to the Federal Con-

stitution extends 'to all acts of the State, whether through its legislative, its executive or its judicial authorities". The Court continued (p. 46):

> "No judgment of a court in due process of law, if rendered without jurisdiction in the court, or without notice to the party.
>
> The words 'due process of law', when applied to judicial proceedings, as was said by *Mr. Justice* Field speaking for this Court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.' *Pennoyer* v. *Neff*, 95 U.S. 714, 733.
>
> Even a judgment in proceedings strictly *in rem* binds only those who could have made themselves parties to the proceedings, and who had notice, either actually, or by the thing condemned being first seized into the custody of the court [cases cited]. And such a judgment is wholly void, if a fact essential to the jurisdiction of the court did not exist."

The same principle that notice must be given in some proper form to a defendant before a valid judgment can be given against him in any case was recognized in this Court in the case of *Twining* v. *New Jersey*, 211 U.S. 78. Though the issues and facts in the *Twining* case bear no resemblance to those here, this Court enunciated the following principle of constitutional law (p. 110):

> "Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction . (*Pennoyer* v. *Neff*, 95 U.S. 714, 733; *Scott* v.

McNeal, 154 U.S. 34; *Old Wayne Mut. Life Asso.* v. *McDonough*, 204 U.S. 8), and that there shall be notice and opportunity for hearing given the parties. (*Hovey* v. *Elliott*, 167 U.S. 409; *Roller* v. *Holly*, 176 U.S. 398; and see *Londoner* v. *Denver*, 210 U.S. 373)."

The same principle was again enunciated by this Court in the case of *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U.S. 673. Again the facts bear no resemblance to the case at bar, but this Court said (p. 681):

> "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. . . . Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. Compare *Postal Teleg. & Cable Co.* v. *Newport*, 247 U.S. 464, 475, 476."

The case of *Shelley* v. *Kraemer*, 334 U.S. 1, another case bearing no resemblance to this case upon the facts, nevertheless afforded this Court an opportunity to make the following observation (p. 16):

> "The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment. *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U.S. 673. Cf. *Pennoyer* v. *Neff*, 95 U.S. 714."

Again, in *Standard Oil Co.* v. *Missouri ex rel. Hadley*, 224 U.S. 280, this Court said on this subject (p. 281):

> The Federal question is whether, in that court [the Supreme Court of Missouri], with such jurisdiction

[original quo warranto proceedings], the defendants were denied due process of law. Under the 14th Amendment they were entitled to notice and an opportunity to be heard. That necessarily required that the notice and the hearing should correspond, and that the relief granted should be appropriate to that which had been heard and determined on such notice."

The void judgment for possession was, therefore, not due process of law under the 14th Amendment.

The Money Judgment for Costs was Void as In Contravention of Federal Law.

Turning to the money judgment for costs rendered by the Municipal Court of Chicago against the Petitioner, Ruth Page Fisher, since no process was personally served upon her in the State of Illinois or elsewhere, since no substituted service was ever had upon her, and since she never appeared in the proceedings, it is plain that the money judgment against her was not merely voidable, but was absolutely void for want of jurisdiction over her.

It is quite unthinkable that a money judgment for costs can constitutionally be entered in any case against any defendant who, not having been properly served or notified of the proceeding, refuses to enter any appearance, refuses to file an answer and refuses to participate in the proceedings. Costs can only be constitutionally awarded against parties who are properly served or notified, or who voluntarily participate in the litigation. To enter a money judgment for costs against a defendant who, having never been served or notified, also refuses to enter the proceedings at all, is not due process of law under the 14th Amendment. A money judgment for costs against a defendant under these circumstances is held to be void under Illinois law. *Mead* v. *Mead*, 205 Ill. App. 327; *Bickerdike*

v. *Allen*, 157 Ill. 95, 102; *Griffin* v. *County of Cook*, 369 Ill. 380, 387-8. Conversely, a money judgment for costs cannot validly be rendered in Illinois in favor of a defendant who has entered no appearance in the case. *Harty* v. *Smith*, 74 Ill. App. 194; *G. A. Crancer Co.* v. *Williams*, 191 Ill. 451.

Such a money judgment for costs is not due process of law under the 14th Amendment.

II.

A VOID JUDGMENT CANNOT BE VALIDATED MERELY BY A SUBSEQUENT APPEAL THEREFROM; AND A PARTY AGAINST WHOM A VOID JUDGMENT HAS BEEN RENDERED IS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS UNDER THE 14TH AMENDMENT OF THE FEDERAL CONSTITUTION BY AN AFFIRMANCE OF A VOID JUDGMENT ON APPEAL.

So far as we are able to determine, this is a unique case in the history of modern American jufisprudence. A void judgment in a state trial court has been affirmed upon appeal to the State Court of last resort, upon the incredible ground that the defendant against whom the void judgment ran had validated the void judgment after it was rendered merely by filing a notice of appeal to the State Appeal Court.

In the case at bar, the State statute (Section 18 of the Illinois Forcible Entry and Detainer Act) (Ill. Rev. Stat., 1957, Chap. 57, Sec. 19) required in forcible detainer cases that any party against whom a judgment was rendered for possession who desired to take an appeal therefrom must file a notice of appeal and bond within five days from the rendition of the judgment. The same statute withheld the writ of restitution until the expiration of such five days.

On the fourth day after the judgment was rendered in this case in the Municipal Court of Chicago against the Petitioner, Ruth Page Fisher, she filed a notice of appeal to the Illinois Appellate Court (Abst. 8). Void judgments are fully appealable under Illinois law. See *People* v. *Evans*, 262 Ill. 235, and other Illinois cases cited below.

It was the position of the Appellate Court in affirming this judgment that Petitioner, Ruth Page Fisher, had validated the prior void judgment of the Municipal Court, merely by joining in the subsequent appeal to the Appellate Court. As the Appellate Court expressed it in its opinion:

> "By joining in the appeal in this [Illinois Appellate] court she [Petitioner, Ruth Page Fisher] submitted to the jurisdiction of the [trial] court, and the attempt to raise the question of service of process comes too late." (Appendix II, p. 4.)

Under the law of Illinois, it is undeniable that Petitioner, Ruth Page Fisher, had the right of election, *either* to move to vacate the void judgment within thirty days *or* to appeal to the Illinois Appellate Court for a reversal of the void judgment of the Municipal Court within the five-day period allowed by Section 18 of the Illinois Forcible Entry and Detainer Act, without making such a motion to vacate. It was this latter right of which Petitioner, Ruth Page Fisher, elected to avail herself in taking the appeal to reverse the void judgment, four days after the void judgment was rendered. To deprive her of the benefit of her right to appeal under Section 18 and thereby secure a reversal of the void judgment would deprive her of the equal protection of the laws guaranteed to her by the 14th Amendment. The entry of the void judgment in the Municipal Court and the affirmance of the void judgment by the Illinois Appellate Court deprived her of due process of law under the 14th Amendment.

That the right of Petitioner, Ruth Page Fisher, to refuse to file a motion to vacate the void judgment within thirty days, and instead to appeal within five days to the Illinois Appellate Court for a reversal did not affect her right of appeal is shown by Section 68.3 of the Illinois Civil Practice Act and the identical provision of Section 68.3 of the Rule of the Municipal Court of Chicago, both of which provide (in the final sentence):

> "Neither the filing of nor the failure to file a motion under this section [to vacate a prior judgment] limits the scope of review [on appeal]."

Thus the Illinois statute and rule cited above expressly provide that the failure of an appellant to avail himself of the right to attack a judgment against him by motion within thirty days in the trial court shall *not* affect or limit such party's right to appeal from the adverse judgment to the Illinois Appellate Court.

The Illinois cases are to the same effect. They hold that a party may appeal to the upper court without first moving to vacate the judgment in the trial court appealed from. See *Atlas Finishing Co.* v. *Anderson*, 336 Ill. App. 167, citing *Climax Tag Co.* v. *American Tag Co.*, 234 Ill. 179, in which *Atlas* case the Illinois Supreme Court was construing this same Section 68 of the Illinois Civil Practice Act. The Illinois Supreme Court quoted the following language from its own prior opinion in the *Climax* case:

> "A motion for a new trial in cases tried by a court without a jury is neither required nor authorized by law or rules of practice, and can serve no purpose whatever in preserving questions for review in this court."

See also *Keith* v. *Arnold & Co.*, 254 Ill. App. 115; *Transcontinental Ins. Co.* v. *Rosenbloom*, 274 Ill. App. 341; *Niagara Fire Ins. Co.* v. *Forehand*, 169 Ill. 626; *Trout* v. *Herrin*, 245 Ill. App. 346. All are to like effect.

That this right of election to appeal to reverse a void judgment is a substantial one is shown by the penalty imposed upon an Illinois defendant who elects to rely upon a motion to vacate a void judgment. Merely by making the motion to vacate, and having it granted, the defendant voluntarily submits himself to the future jurisdiction of the trial court. *Lord* v. *Hubert*, 12 Ill. (2d) 83, 87. And if the motion to vacate is denied, the defendant will have lost the right to appeal by expiration of the five-day period.

We do not, of course, contend that the right to appeal from a judgment in and of itself is essential to due process of law. It is not. Nor do we say that a right to appeal may not be properly qualified and yet constitute due process. It may. What we do say is that if an unqualified right of appeal from a judgment which is void, without first making a prior motion to vacate the void judgment, exists, as it clearly does under Illinois law as shown above, then it is unconstitutional to enter the void judgment in the first place, and to deprive a defendant of this right to vacate the void judgment by appeal in the second place, for such defendant is thereby denied due process of law and the equal protection of the laws guaranteed by the 14th Amendment.

It is a travesty on justice for a state to grant a right of appeal from a void judgment, as does Illinois (*People* v. *Evans*, 262 Ill. 235; *Moffat Coal Co.* v. *Industrial Commission*, 397 Ill. 196; *People* v. *Coal Belt Elec. Ry. Co.*, 311 Ill. 29; *Donnersberger* v. *People*, 293 Ill. 148), and then to hold on the appeal that the void judgment be affirmed because the mere filing of a notice of appeal to reverse the

void judgment validates the void judgment. Certainly this does not constitute due process of law and equal protection of the laws under the 14th Amendment.

What this really amounts to is entrapment by State judicial procedure. Defendant is first subjected to a void judgment in the State Court in defiance of the constitutional protection against such lack of due process, and then, when the Defendant resorts to the state-granted right of appeal to reverse the void judgment, the State judicially closes the trap by holding that the exercise of the right of appeal validates the void judgment. This amounts to the State, through its judicial process, flouting the right of due process of law and equal protection of the laws guaranteed to the States' citizens by the 14th Amendment to the Federal Constitution.

In this case Petitioner, Ruth Page Fisher, has thus had her property rights to possession of real estate taken from her in defiance of the Federal rights guaranteed to her under the 14th Amendment to the Federal Constitution.

Only by this Court's issuance of its writ of *certiorari* can this result be prevented.

CONCLUSION.

We recognize that the granting of a petition for *certiorari* is discretionary with the Court, and that such writ will not be granted merely because of error by the Illinois State Courts, unless such error contravenes fundamental Federal law.

But the importance of this case lies in the fact that the Illinois Courts have announced a rule which would wholly subvert due process of law and the equal protection of the laws, guaranteed by the 14th Amendment, in State Courts.

To grant, as the Illinois statutes and law do, the unqualified right to appeal from a void judgment, and then to hold that the exercise of such right of appeal validates the void judgment and justifies its affirmance on the appeal, introduces into State Court procedure a conception of far reaching evil consequences wholly subversive of Federal law.

We regard the decision of the Illinois Supreme Court in rejecting the appeal from the Illinois Appellate Court, the action of affirmance in the Illinois Appellate Court of the void judgment in the trial court, and the entry of the void judgment in the Municipal Court of Chicago as depriving Petitioner, Ruth Page Fisher, of her substantial Federal rights.

PRAYER FOR THIS COURT'S WRIT OF CERTIORARI

For reasons apparent from the record and stated in this Petition for Certiorari, Petitioners respectfully pray that this Court issue its writ of *certiorari* to review and reverse the judgments of the Illinois Supreme Court, the Illinois Appellate Court, First District, and the Municipal Court of Chicago in this case, to the end that Petitioners' Federal rights herein claimed may be effectuated.

Respectfully submitted,

HORACE A. YOUNG,
NORMAN CRAWFORD,
135 South La Salle Street,
Chicago 3, Illinois,
Randolph 6-7871,
Attorneys for Petitioners.

CERTIFICATE AND PROOF OF SERVICE.

Horace A. Young hereby certifies that he has caused service of this Petition to be made upon opposing counsel by the sending of three printed copies of the Petition for Certiorari to counsel of record for Respondent at their address as shown of record in the courts below.

HORACE A. YOUNG,
a member of the Bar of this Court.

APPENDIX I.

State of Illinois,
Supreme Court—ss.

Be It Remembered, that, to-wit: on the 16th day of September, 1958, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

Thomas Hart Fisher and Ruth Page Fisher, his wife, *Petitioners* vs. Printing Developments, Inc., a corporation, *Respondent*	Petition for Leave to Appeal from Appellate Court First District 56 M 57357 47146

No. 34982

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioners costs by it in this behalf expended, to be taxed, and that it have execution therefor.

APPENDIX II.

Printing Developments, Inc., Plaintiff-Appellee, v. Thomas Hart Fisher and Ruth Page Fisher, His Wife, Defendants-Appellants.

Gen. No. 47,146 (Abstract of Decision.)

First District, Second Division.

May 28, 1958.

Rehearing denied June 20, 1958.

Released for publication July 1, 1958.

Appearances, § 12—joinder in appeal of a codefendant as constituting submission to jurisdiction of court.

Where wife, who was codefendant with her husband in a forcible detainer suit in which judgment for possession was entered in favor of plaintiff, was never served with summons, entered no appearance, and filed no answer, but she joined in appeal of her husband from such judgment, she thereby submitted to jurisdiction of court, and her attempt on appeal to raise question of service of process came too late.

Appeal from Municipal Court of Chicago; the Hon. Joseph J. Butler, Judge, presiding. Affirmed. Norman Crawford, for appellants; MacLeish, Spray, Price & Underwood (Cranston Spray, and Wendell J. Brown, of counsel) for plaintiff-appellee. Opinion by Justice Lewe. *Not to be published in full.*

OPINION OF THE APPELLATE COURT.

Mr. Justice Lewe Delivered The Opinion Of The Court.

Defendants appeal from a judgment entered in a Forcible Detainer Suit. The premises in controversy consist of approximately 350 square feet enclosed as a storeroom in the basement storage in the Michigan Square Building, known as "B-3", and located at 540 North Michigan Avenue in the City of Chicago, Illinois.

Defendants occupied certain space on the tenth floor in the Michigan Square Building under written leases from 1930 until 1945. Thomas H. Fisher executed a written lease for the tenth floor for the month of November, 1953. Upon the termination of this lease, defendants vacated the premises on the tenth floor. Defendants also used the storeroom space known as "B-3" in the basement. In October, 1953, when Thomas H. Fisher executed the lease for one month for the tenth floor, he asked plaintiff for a little more time to remove property of defendants in the storeroom. This storeroom at all times was fully enclosed and kept under lock and key. Defendants had a key to B-3, and it was accessible to them at all times.

Commencing in February, 1954, and in 1955, until March 20, 1956, oral requests were repeatedly made by plaintiff to defendants to remove property from B-3. March 20, 1956, plaintiff served written notice on defendant, Thomas H. Fisher, which read as follows:

"Dear Sir:

"It has been considerably more than a year since I called you with respect to certain valuable basement space in the above building, which is being used for storage of some personal property belonging to you. At that time you told me that you were making arrangements which would be completed in a few months to remove your said property. Since that time I have made a number of telephone calls to your office but received no response to my messages.

Since this basement space is needed for building purposes, we cannot permit this situation to continue. We must, therefore, ask that you make immediate arrangements to remove your property without delay. If there is any reason why this is not possible, please so advise us and we may be able to be of some assistance.

Very truly yours,
Arthur Rubloff & Co.
S. L. Edelstein"

Fisher failed to remove the property, and on June 27, 1956, Forcible Detainer proceedings were instituted for possession of the premises B-3.

The record shows that Ruth P. Fisher, wife of Thomas H. Fisher, was never served with summons, entered no appearance, and filed no answer. But, four days after the judgment was entered, she joined in the appeal of Thomas H. Fisher.

The question presented is whether the judgment for possession in the Forcible Detainer Suit is void as against defendant, Ruth Page Fisher, for lack of service of process.

This question can be raised only by filing a special appearance in the trial court. Being a dilatory motion, it does not reach the merits of the case, and failure to confine an appearance to a denial of jurisdiction, will change the appearance to a general one. *Kelly* v. *Brown*, 310 Ill. 319. To avail herself of the right to question the jurisdiction of the court, defendant, Ruth Page Fisher, should either have not appeared at all or limited her appearance to an objection against the jurisdiction of the court. *Craven* v. *Craven*, 407 Ill. 252. Moreover, Ruth P. Fisher could have moved the court to vacate the judgment entered against her in the trial court during the thirty day term in accordance with Illinois Revised Statutes, Chapter 110, par. 50(6) and Municipal Court Rule 1, Section 50(6). By joining in the appeal in this Court, she submitted to the jurisdiction of the court, and the attempt to raise the question of service of process comes too late.

Defendants further contend that plaintiff's suit for possession of the space known as "B-3" should fail because plaintiff had leased these premises to Time, Incorporated.

The only evidence in the record bearing on this point is where Thomas H. Fisher cross-examined plaintiff's witness, Walter C. Finn, who managed the building for Arthur Rubloff & Co. The questions propounded by Thomas H. Fisher and the answers given by Mr. Finn read:

"Q. Now, you used the word, 'Time, T-i-m-e, in one of your answer. You meant Time, Incorporated, the publisher of Time magazine, Fortune magazine and Life magazine, did you?

"A. I meant Time, Incorporated, that is correct, as embodies the tenants of the Michigan Square Building. They have a tenancy at the Michigan Square Building.

"Q. Now I am lost. What tenancy have they got there?

"A. They rent from Printing Developments, Inc., Mr. Fisher.

"Q. What space do they lease in the building?

"A. Well, they go from partial occupancy on the second floor completely through the building to and including the basement that we are speaking of now.

"Q. The B-23, B-3 areas?

"A. In that general area, yes, Mr. Fisher.

"Mr. Brown: Not B-3.

"The Witness: I said in that general area."

The record further shows that partitions were removed from B-23, as well as other storage spaces B-25, B-26 and B-27. This space, which was formerly enclosed, is now all open. None of this area includes the space known as "B-3". Nor does it appear that the space known as "B-3" was leased to Time, Inc. Moreover, the defense that there was outstanding a lease of the same premises to Time, Inc., was not raised in the trial court. In our view, the contention is without merit. This is a suit for wrongful detention and title cannot be inquired into. The

right to immediate possession is all that is involved or can be determined. It appears to us that defendants argue that plaintiff is obligated to trace its title from the original patent deed. This is not necessary in a possessory action.

The undisputed evidence shows that the title to the building at 540 N. Michigan Avenue was conveyed February 28, 1945 by special warranty deed issued by the Northwestern Mutual Life Insurance Company to the Michigan Square Building Corporation; that the Michigan Square Building Corporation merged with the plaintiff; and that under the articles of merger, all title to the real estate in question became the property of plaintiff. Seymour Edelstein, Secretary and Treasurer of Arthur Rubloff & Company, agents, testified that at the time plaintiff became owner of the premises by virtue of the merger, that same company continued as manager of the premises, and that on December 31, 1952, the Michigan Square Building Corporation assigned the management contract dated May 22, 1951 to plaintiff. Walter C. Finn, manager of the building at 540 N. Michigan Avenue, testified that all "leases went across his desk" during the six years of his administration; that no lease was made for storage in B-3 with either defendant in this period; and that neither of them has produced receipts to show that any rent was paid after October 14, 1953.

Defendants insist that where a holdover tenant occupies the premises involved and pays rent for a period of seven or eight years, plaintiff is required to give proper notice to the tenant.

The lease for the tenth floor space made no mention of the B-3 area. Proof is lacking that any rent was paid for the basement storage space during the 7 or 8 years immediately prior to 1953, or that defendants were holdover

tenants. In any event, these questions of fact were determined adversely to defendants by the trial court. We perceive nothing indicating the relationship of landlord and tenant. The court could find that defendants were mere licensees, and plaintiff had only to give notice that the license was revoked. (*Dunstedter* v. *Dunstedter*, 77 Ill. 580 and *B. J. Bielzloff Products Company* v. *James B. Beam Distilling Company*, 3 Ill. App. 2d 530.)

Finally defendants contend that the premises in question are not sufficiently described in the pleadings. It is our view that the premises referred to by all parties as, the basement storage space, B-3, at 540 N. Michigan Ave. in Chicago, Illinois, are sufficiently described. (*Chicago Ry. Equipment Co.* v. *Wilson*, 250 Ill. App. 231 and *Mills* v. *Reiger*, 328 Ill. App. 230.) There is no evidence in the record that there was any doubt or confusion regarding the exact space plaintiff sought to recover. On the contrary, it is uncontroverted that the premises involved were enclosed; that they contained a door with a cabinet lock; that defendants held a key; and that defendants admit in their answer that they hold possession of the premises in controversy.

We have considered the other points argued and the authorities cited in support thereof, but in the view we take of this case, it is unnecessary to discuss them. Therefore, for these reasons, the judgment below is affirmed.

AFFIRMED.

KILEY, P.J. and MURPHY, J. CONCUR.

Abstract Only.

APPENDIX III.

IN THE MUNICIPAL COURT OF CHICAGO,
FIRST DISTRICT.
No. 56 M 57357.

The Court: There is no doubt in my mind but that the Plaintiff has a perfect right to bring this suit.

The Court has in front of it the deed, recorded in the Office of the Recorder of Deeds of Cook County, Illinois, Special Warranty Deed from the Northwestern to the Michigan Square Building Corporation.

And also recorded with the Secretary of State and with the Recorder of Deeds of Cook County, Illinois, is a merger of Michigan Square Building Corporation with the Printing Developments, Inc., giving all assets of the Michigan Square Building Corporation to the Printing Developments, Inc.

That is a duly recognized corporation, recorded in the Office of the Secretary of State of this state.

As far as the demand is concerned, I am satisfied that the demand was made.

I have in front of me Exhibit No. 9, a copy of a letter to Mr. Thomas Fisher, addressed on March 20, 1956, stating: "We ask that you make immediate arrangement to remove your property without delay. If there is any reason why this is not possible, please advise us so we will be able to be of some assistance." Signed, Arthur Rubloff & Company, Managing Agent for Printing Developments, Inc.

I believe there was a demand, and I believe Printing Developments, Inc. has a right to bring the action.

Furthermore, the argument on service, whether it was right or wrong, as Mr. Fisher contends, being across from the Plaintiff, which is an unusual circumstance, I think we

agreed in the middle of this case that service is not part of this case.

First of all, the Defendant has put himself within the Court's jurisdiction by filing a full defense without a special appearance. So whatever rights he had have been waived by the defense and also by oral statements here in Court today.

Defendant has now no written lease. I don't mean by that he might not have had one a year or two ago and he can't find it and it might have been in a prior case; but as of right now there is no written lease in existence, there is no written lease in force.

Also, I wish to point out for the record that Mr. Fisher, the defendant, had a lease for one month with Printing Developments, Inc. I point out also that the deed to its predecessor prior to the merger includes a legal description, lots, blocks, sections, townships and range, which show the entire property. That means the tenth floor or the basement just as well as the tenth floor. And Mr. Fisher signed a lease for one month on the tenth floor, and the Plaintiff had just as much a right to the base ment under the terms of the prior deed and merger in the basement under those instruments as he did on the tenth floor. In other words, one building goes by lot, block, section, range, name of subdivision, transfer.

There is a deed in evidence here also, and a demand has been made.

There will be a finding for the plaintiff.

I will go one step further. I cannot understand, Mister Plaintiff, why you just didn't take the personal property out of there and put it away somewhere and forget it.

I think the Defendant, in my opinion—I know he is going to appeal this; good-luck to him—I don't think he has any right there whatsoever. I am amazed he stayed there so long.

Finding for the Plaintiff. Judgment for possession. Writ stayed five days. In case of appeal make a nominal bond. Approximately what would you suggest for appeal?

Mr. Fisher: $250.00.

The Court: $250 is enough for the bond.

APPENDIX IV.

IN THE MUNICIPAL COURT OF CHICAGO,
FIRST DISTRICT.
No. 56 M 57357.

Judgment entered November 1, 1956.

Now come the parties to this cause and thereupon this cause comes on in regular course for trial before the court without a jury, and the Court having heard the evidence and the arguments of counsel and being fully advised in the premises enters the following finding, to-wit:

> "The Court finds the Defendants, Thomas H. Fisher and Ruth Page Fisher, guilty of unlawfully withholding from the Plaintiff the possession of the premises described in Plaintiff's complaint herein and that the right to the possession of said premises is in the Plaintiff".

This cause coming on for further proceedings herein, it is considered by the Court that the plaintiff have judgment on the finding herein and that the plaintiff have and recover of and from the defendants, Thomas H. Fisher and Ruth Page Fisher, possession of the premises described in the complaint herein, and that the writ of restitution issue therefor.

It is further considered by the Court that the plaintiff have and recover of and from the defendants, the costs by the plaintiff herein expended and that execution issue therefor.

It is further ordered by the Court that the Writ of Restitution herein be and the same is hereby stayed ten (10) days.

Appeal Bond set at $250.00.

FILE COPY

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NOV 14 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 461

THOMAS HART FISHER AND RUTH PAGE FISHER, HIS WIFE,

Petitioners,

vs.

PRINTING DEVELOPMENTS, INC., A CORPORATION,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

CRANSTON SPRAY,
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THE BLAKELY-WARREN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 461.

THOMAS HART FISHER AND RUTH PAGE FISHER, HIS WIFE,
Petitioners,

vs.

PRINTING DEVELOPMENTS, INC., A CORPORATION,
Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

RESTATEMENT OF FACTS.

By their petition for a writ of certiorari, the defendants, Thomas H. Fisher and Ruth Page Fisher, his wife, contest a final judgment for possession entered in an Illinois statutory forcible detainer suit returnable in the Municipal Court of Chicago, Illinois, which judgment provides that the respondent, owner of a building in Chicago, Illinois, have and recover possession of the B-3 storeroom space in the basement of that building from the petitioners (Abst. 1, 2, 7).

There was evidence that each of the defendants continued to use the B-3 storage space in the building, and Mrs. Fisher was, therefore, also made a party defendant (Abst.

20). However, there was no pretense during their joint appeal on the non-federal merits in the appellate court that the defendant Ruth Page Fisher had any claim of a right of occupancy of the storeroom space except through the defendant Thomas Hart Fisher (App. 3-7, Pet. for cert.).

After issuance of summons on June 27, 1956 (Supp. Abst. 1) alias summons on August 23, 1956 (Supp. Abst. 2) and second alias summons on September 13, 1956 (Supp. Abst. 2), with returns by the bailiff "Defendant not found", respondent requested the bailiff to post and mail notices to the defendants under the procedure set up in the Municipal Court of Chicago Act, which provides for posting and mailing of notices in a forcible detainer suit where possession only and no rent is sought (Ill. Rev. Stat. C. 37, para. 403 (1955)).

The endorsement of the bailiff on the notice showed that he posted them in the three public places (Abst. 4) and that he mailed copies of the notices to the building address (Abst. 4).

The defendant, Thomas Hart Fisher, filed an answer (Abst. 5), and testified at the trial (Abst. 26-35).

Instead of contesting jurisdiction of her person in the trial court, under orderly state procedures set up under Illinois practice (Ill. Rev. Stat. C. 110, Sec. 50(6) (1955) or identical Sec. 50(6) Municipal Court of Chicago Rule 1 or under Ill. Rev. Stat. C. 37, Sec. 357, Fourth (d) (1955)), the defendant Ruth Page Fisher served and filed in the court below a joint notice of appeal four days after the judgment for possession had been entered (Supp. Abst. 3) and within the period provided under Illinois practice in which a motion could have been made in the trial court, which would contest the court's jurisdiction of her person on the ground of a defect in the process.

The trial court did not and was not asked by either defendant to pass on any question arising out of any defect in the service of process upon either defendant.

On May 28, 1958 the Illinois Appellate Court held that jurisdiction of the person as distinguished from jurisdiction of the subject matter was a matter which under Illinois law could be and had been waived by each defendant on the facts of this case (Opinion of Ill. App. Court, App. 3-7 of Pet. for Cert.).

The Illinois Appellate Court held the defendant Thomas Hart Fisher to have waived any defect in process by filing his answer, etc., and held the defendant Ruth Page Fisher to have waived any such defect by her failure to raise the point of jurisdiction of her person in the trial court under procedures which were available to her in the trial court (Opinion of Ill. App. Court, App. 3-7 of Pet. for Cert.).

No constitutional point was raised in the Illinois Appellate Court (Pet. for Cert. pp. 2, 11). On June 30, 1958 the Appellate Court denied a petition for rehearing (Pet. for Cert. p. 2). No constitutional point was raised in the petition for rehearing before the intermediate Illinois Appellate Court (Pet. for Cert. pp. 2, 11).

On September 16, 1958, without comment, the Illinois Supreme Court denied leave to appeal from the Appellate Court to the Supreme Court of Illinois (App. I to Pet. for Cert.).

POINTS AGAINST ALLOWANCE OF PETITION.

On the facts the petition for writ of certiorari herein should be denied on either or both of the grounds:

I. The United States Supreme Court does not take a case on petition for certiorari under Title 28, para. 1257(3) or under its Rule 19 to upset a state court judgment on the ground that "due process" under the Fourteenth Amendment was violated where the record does not show that such federal question was raised in the state court at the earliest fair opportunity, or that any state court including the highest state court ever passed upon the point.

II. The Illinois state law applicable and applied by the state court to the facts of this case is that:

> Where a party litigant in a civil lawsuit fails to avail himself in the trial court of the opportunity of using the orderly state procedures and state rules provided such litigant for objection to the jurisdiction of the court over his person, as distinguished from jurisdiction of the subject matter, and where such party litigant, instead of availing himself of any of such orderly processes provided for him in which to raise such objection in the trial court, serves and files a notice of appeal in the trial court, such party litigant is thereby held under state law to have waived or to be estopped from thereafter raising any issue with respect to jurisdiction of his person (Opinion of Appellate Court, App. 4 of Pet. for Cert.).

Such Illinois state law is not in violation of the 14th Amendment of the Federal Constitution.

ARGUMENT.

The petition for certiorari should be denied because:

Point I.

A. PETITIONERS FOR THE FIRST TIME ASSAILED ON CONSTITUTIONAL GROUNDS THE JUDGMENT OF THE MUNICIPAL COURT OF CHICAGO FOR POSSESSION IN THIS ILLINOIS STATUTORY FORCIBLE DETAINER SUIT IN THEIR PETITION FOR LEAVE TO APPEAL TO THE SUPREME COURT OF ILLINOIS FROM THE APPELLATE COURT OF ILLINOIS. NO CONSTITUTIONAL QUESTION WAS PRESENTED TO OR PASSED UPON BY THE TRIAL COURT OR BY THE INTERMEDIATE APPELLATE COURT OR, UNDER ITS PRACTICES, BY THE ILLINOIS SUPREME COURT.

The defendant Thomas Hart Fisher came into the case before judgment. Accordingly if that defendant had desired to raise any issue involving the sufficiency of the process against him he could have proceeded in accordance with the established practice in the court below. Under Sec. 20 of Ch. 110 of the Illinois Civil Practice Act (Municipal Court of Chicago Rule 1, Sec. 20), he could have filed a special appearance "prior to filing any other pleading or motion", and thus preserved any point he may have desired to make with respect to any defect in the posting or mailing of notice to him.

The defendant Ruth Page Fisher came into the case after judgment. She elected to continue the same case by service and filing of notice of appeal within the 5-day period provided by the forcible entry statute. Either under Sec. 50(6) of Ch. 110 of the Illinois Civil Practice Act (Ch. 110 Sec. 50(6) Ill. Rev. Stat. 1955, Rule 1, Sec 50(6) of the Rules of Civil Practice in the Municipal Court of Chicago or under the Municipal Court of Chicago Act (Ill. Rev. Stat. C. 37 para. 376 (1955)), or under the Municipal

Court of Chicago Act (Ch. 37, Sec. 403 First (c) Ill. Rev. Stat. (1955)) she could have specially moved and thus preserved any point she may have desired to make with respect to any defect in the posting or mailing of notices.

No constitutional question was raised or passed on by the intermediate appellate court (Pet. for Cert. pp. 2, 11).

The Supreme Court denied their petition for leave to appeal to it without comment (Pet. for Cert., App. I.).

Illinois Law.

Illinois state law provides that where it does not appear that any constitutional question has been presented to and passed upon by the trial court, and the ruling of such court obtained and preserved in the record, and no error was assigned upon it, such question is not reviewable by the Supreme Court of Illinois. (*Adams* v. *Board of Education of School District 41 DuPage County* (1953), 415 Ill. 227, 233, 234, 112 N. E. (2d) 473, 476.) Although the petitioners filed a petition for rehearing in the intermediate Illinois Appellate Court, there is no showing that a constitutional limitation point was raised there. In fact the petition for certiorari, in compliance with the rule which requires the petitioner to state when the federal question was first raised, states that it was raised in the petition to the Illinois Supreme Court for leave to appeal from the Illinois Appellate Court (Pet. for Cert., p. 11). Under Illinois law this was too late, inasmuch as under Illinois law a "constitutional limitation must be pointed out and preserved for review in order to obtain a determination of such question by this (Illinois Supreme) court." (*Biggs* v. *Cummins*, 5 Ill. (2d) 512, 516, 126 N. E. (2d) 208, 210.)

Whenever a person regards his constitutional rights invaded the duty is on him to raise an objection at the earliest fair opportunity and the failure to do so amounts to a

waiver of the right. (*Village of Riverside* v. *Kuhne* (1947), 397 Ill. 108, 73 N. E. (2d) 286, 287, 288; *Chicago-San Coal Co.* v. *Indus. Com.* (1922), 301 Ill. 389, 392, 134 N. E. 158, 159; *Shoal Creek Coal Co.* v. *Indus. Com.* (1921), 300 Ill. 551, 553, 133 N. E. 218, 219.)

Accordingly by mere denial of leave to appeal from the Appellate Court judgment, which affirmed the Municipal Court of Chicago judgment for possession in this forcible detainer suit, the Supreme Court of Illinois under its state law did not pass on any question of federal constitutionality of that judgment, inasmuch as such question had not been raised, either in the trial court or in such appellate court.

Federal Law.

A federal question which was not decided by the highest court of a State in which a decision could be had because not seasonably raised to evoke its decision under the local state practice, will not be decided by this Court.

Title 28, United States Code, para. 1257.
Barbour v. *Georgia* (1919), 249 U. S. 454, 460.
Missouri, K. & T. Ry. Co. v. *Sealy* (1918), 248 U. S. 363, 364, 365.
Chesapeake & Ohio Railway Co. v. *McDonald* (1909), 214 U. S. 191, 193, 195.

B. THE DUE PROCESS CLAUSE IS NOT A LITIGANT'S AMMUNITION WHICH CAN BE KEPT IN STORAGE TO OBTAIN AN ADVANTAGE OVER THE OTHER PARTY. IT MUST BE RAISED AT THE EARLIEST OPPORTUNITY.

The federal question must be presented to the trial court at the appropriate point under state procedure. (*Hulbert* v. *Chicago*, 202 U. S. 275, 279, 280.) If this is not done the Supreme Court will decline to exercise jurisdiction where the

highest state court is completely silent on the federal question. (*Mutual Life Insurance Co.* v. *McGrew*, 188 U. S. 291, 309.) In such case the Supreme Court infers, unless it can affirmatively be shown otherwise, that the silence is due to the procedural deficiency. (*Bailey* v. *Anderson*, 326 U. S. 203, 206-7.)

When Federal Question First Raised.

The earliest opportunity to have raised a question of due process by either of the defendants would have been in the trial court, either by motion to quash the process before judgment (Ch. 110, Sec. 20, Ill. Rev. Stat. (1955) or Municipal Court of Chicago Rule 1, Sec. 20), or after judgment, by motion or petition under any one of several procedures which are provided by State law. Ch. 110, Sec. 50(6), Ill. Rev. Stat. (1955); Rule 1, Sec. 50(6) of the Rules of Civil Procedure in the Municipal Court of Chicago; or, under the Municipal Court of Chicago Act (Ch. 37, para. 376, Ill. Rev. Stat. (1955); or under Ch. 37, Sec. 403 First (c), Ill. Rev. Stat. (1955).)

The earliest opportunity to have raised a question of "due process" after the intermediate appellate court applied the crystallized and well documented Illinois law of waiver was in a petition for rehearing before that court. The petition for certiorari shows that a petition for rehearing was filed in the intermediate Illinois Appellate Court (Pet. for Cert., p. 2). It does not show that such constitutional point was raised in the petition for rehearing before the Illinois Appellate Court. On the contrary the petition for certiorari affirmatively states that the constitutional point was raised in the petition for leave to appeal to the Illinois Supreme Court (Pet. for Cert., p. 11) and it was in fact raised for the first time in the petition for leave to appeal to the Illinois Supreme Court, where under its practice it would not have passed on it.

Accordingly the federal question now raised was neither raised in the state court at the earliest opportunity, nor does the record show that any state court, highest or otherwise, ever passed on the point.

Point II.

IF A PARTY FAILS TO AVAIL HIMSELF OF THE OPPORTUNITY OF USING THE ORDERLY PROCEDURES AND RULES PROVIDED FOR OBJECTING TO THE JURISDICTION OF THE TRIAL COURT OVER HIS PERSON, AND BY SUCH FAILURE IS HELD UNDER STATE LAW TO HAVE WAIVED OR TO BE ESTOPPED TO RAISE SUCH OBJECTION THEREAFTER ON APPEAL, OR IN ANY LATER STAGE OF THE SAME CASE, SUCH STATE LAW OF WAIVER OR ESTOPPEL AND ITS APPLICATION TO THE UNDISPUTED FACTS OF THIS CASE IS NOT VIOLATIVE OR CONTRARY TO THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT, AND DOES NOT CONSTITUTE A VIOLATION BY THE STATE OF DUE PROCESS UNDER THAT CLAUSE.

Illinois Law of Waiver.

It is axiomatic that while lack of jurisdiction of the court as to the subject matter cannot be waived, yet the method by which jurisdiction of a particular case within the general class of cases is obtained, and any differences or irregularities in respect thereto, including irregularities in process, may be waived and is waived unless objection is made in accordance with the established practice in the court below.

Wilson Bros. v. *Haege* (1932), 347 Ill. 140, 143.

People v. *United Medical Service* (1936), 362 Ill. 442, 447.

People v. *Village of Lyons* (1948), 400 Ill. 82, 90.

Jurisdiction of the person is in the category of matters which can be waived.

Kelly v. *Brown* (1923), 310 Ill. 319, 323.

To avail themselves of the right to question jurisdiction of a court which has general jurisdiction of the subject matter, defendants should either have not appeared at all or limited their appearance to an objection against the jurisdiction of the court.

Craven v. *Craven* (1950), 407 Ill. 252, 255.

Difference Between Jurisdiction of Person and Jurisdiction of Subject Matter.

Counsel must—and does not—distinguish between cases where a court does not have jurisdiction of the subject matter of the class of cases involved and a factual situation similar to the facts of our case wherein the court did have such jurisdiction. Of course, a judgment is void where the court does not have jurisdiction of the subject matter.

The Municipal Court of Chicago had jurisdiction of the subject matter.

Ch. 37, para. 357, 359, Ill. Rev. Stats. (1955).

The phrase "void judgment" is used 44 different times in the petition for certiorari, and yet it doesn't make for straight thinking to use the word "void" to describe the judgment appealed from. Before the judgment became a judicial coercive sanction by the issuance of a writ of restitution in accordance with its terms, the petitioners, without raising any issue of jurisdiction of their persons, filed and served in the trial court a notice of appeal, and they have had all the benefits of that appeal on the non-federal merits in the state court.

Due process requires that there be an opportunity to

present every available defense, but it need not be before the entry of judgment. (*American Surety Co.* v. *Baldwin*, 287 U. S. 156, at 168.) In the trial court there were several orderly state processes unused and yet available to petitioners to cure any curable defect in the posting or mailing of notices. The due process clause does not frown upon the use of the principles of waiver or estoppel to reach a fair decision (*Louisville & N. R. Co.* v. *Schmidt* (1900), 177 U. S. 230, 237).

Rationale of Waiver Law Applied to the Facts of This Case.

Under our Illinois practice the case on appeal for review "constitutes a continuation of the proceedings in the trial court" (Ch. 110, para. 74, Ill. Rev. Stats. (1955)).

The time limit for the service of notice of appeal provided by the Forcible Entry and Detainer Act is five days. (Forcible Entry and Detainer Act, Ch. 57, para. 19 (1955), Ill. Rev. Stats.)

Section 20 of the Municipal Court of Chicago Act (para. 375 of Ch. 37 (1955), Ill. Rev. Stats.) provides for the adoption by that court of Rules of Practice, and had either of the defendants wanted relief from a curable irregularity in the posting or mailing of notices by the bailiff, they could have (1) *before* judgment filed a special appearance before taking other action "for the purpose of objecting to the jurisdiction of the court over the person of the defendant" under Section 20 of Rule 1 of the Municipal Court of Chicago, or (2) *after* judgment they could have proceeded either under Section 21 of the Municipal Court of Chicago Act or under Section 50(6) of Rule 1 of the Rules of the Municipal Court of Chicago or under Ch. 37, Sec. 403 First (c), Ill. Rev. Stat. (1955).

Petitioners served and filed notice of appeal in the trial court four days after it rendered judgment for possession.

It is enough for the determination of this petition to know that there is nothing in the Forcible Entry and Detainer Act to prevent a defendant either before judgment or during the 5-day period allowed for service of notice of appeal from raising the point of jurisdiction of the person.

Requisite Element of Curability.

If there was a defect in the posting or mailing of notices, it was a curable one inasmuch as if the bailiff did not post or mail the notices in the correct way, then under the statute the case could have been continued until he did (Ch. 37, para. 403, First (c) (1955), Ill. Rev. Stat.). The trial court had jurisdiction of the subject matter under the statute, and it also had territorial jurisdiction of the premises involved. The particular case is within the class of cases of which the Municipal Court of Chicago has jurisdiction of the subject matter (para. 2 of Municipal Court of Chicago Act, Ch. 37, para. 357 Fourth (d) (1955), Ill. Rev. Stat.). No personal service was required. Defects in publication, posting or mailing are merely procedural and are dilatory in character because they do not go to the merits of a controversy or to jurisdiction of the subject matter and are curable. Accordingly they are in the category of matters which can be waived.

Both the Appellate Court Decision and Its Opinion Were Correct.

The Appellate Court, consistent with axiomatic law based on the idea that a party-litigant cannot be allowed to stand by in the trial court and fail to urge a curable objection and then for the first time claim it in the Appellate Court, held that by joining in the appeal the named defendant,

Ruth Page Fisher, submitted herself to the jurisdiction of the court and that the attempt to raise any question of service of process upon her came too late.

If the law were otherwise, a party-litigant could, in a case where postponement was of the essence, secure such delay, by passing over the trial court. The right of appeal does not include a right to stand mute in a trial court and then take an appeal and not be held to have waived matters of a curable character which could have been raised in the trial court (*Rohrhof* v. *Schmidt* (1905), 218 Ill. 585, 587; *Allen* v. *Sanders* (1938), 369 Ill. 466, 469).

Illinois Law of Waiver Which Petitioners Now Seek to Attack Is Not Violative of the "Due Process" Clause of the 14th Amendment of the Federal Constitution.

When a party voluntarily appears in a cause he cannot thereafter claim that he was denied due process merely because he was not served with process when the original action was commenced. Such matter is one of abatement, and can be waived.

Louisville & N. R. Co. v. *Schmidt* (1900), 177 U. S. 230, 237.

A state "is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Snyder v. *Massachusetts* (1934), 291 U. S. 97, 105.
West v. *Louisiana* (1904), 194 U. S. 258, 263.

Due process requires that there be an opportunity to present every available defense; but it need not be before the entry of judgment.

American Surety Co. v. *Baldwin* (1932), 287 U. S. 156, 168.

The sole object of process is to notify the defendant of pending litigation so as to secure his appearance, and a person may subsequently appear even after judgment and become bound by the foregoing proceedings as if initially served.

Lord v. *Hubert* (1957), 12 Ill. (2d) 83, 87.

Inherently it would not be consistent with any policy of fairness, state or federal, to hold that a defendant, with regular trial court procedures available to him to cure a curable defect, could pass over the trial court and not be held to have waived the point. Otherwise a defendant would get an advantage by delay which would be unjust. Justice or fairness does not permit generosity to one party at the cost of the other party.

Petitioners' Authorities Distinguished on the Facts.

There is no conflict between Illinois cases which hold (1) that a curable defect not urged in the trial court and urged for the first time on appeal is waived and Illinois cases which hold (2) that a party may appeal to the upper court without first availing himself of some *one* of the particular procedural channels in the trial court. There is a material difference between a requirement that at least one of the several channels be used in the trial court and a requirement that a specific one instead of others has to be used. Counsel cites *Atlas Finishing Co.* v. *Anderson*, 336 Ill. App. 167; *Climax Tag Co.* v. *American Tag Co.*, 234 Ill. 179 and Section 68.3 of the Illinois Civil Practice Act (Pet. for Cert. p. 21) to the effect that a litigant doesn't have to proceed by any particular motion where the point has been otherwise preserved. Also counsel cites cases which hold that a litigant does not have to make a motion for new trial to preserve a point otherwise made in the trial court. *Keith* v. *Arnold & Co.*, 254 Ill. App. 115;

Transcontinental Ins. Co. v. *Rosenbloom*, 274 Ill. App. 341; *Niagara Fire Ins. Co.* v. *Forehand*, 169 Ill. 6[illegible]; *Trout* v. *Herrin*, 245 Ill. App. 346. (Pet. for Cert. p. 22).

The intent of the Illinois law, when read and understood in its entirety, inclusive of Section 68.3 of the Illinois Civil Practice Act is not that the trial court is to be kept entirely uninformed about a defect which was curable in the trial court. Such an intent is entirely at odds with the function of an appellate court.

The point under Illinois law on the facts of our case is not merely that the defendants did not proceed under *one* particular rule or pigeon-holed procedure by which they, collectively or separately; could have objected on the ground of some irregularity of the bailiff in his posting or mailing of notices. The point is that neither of them made any objection in the court below under *any* of the regular avenues of procedure which were provided for them to follow there either before or after judgment. The defendant Thomas H. Fisher filed an answer without raising this point, and the defendant Ruth Page Fisher filed a notice of appeal in the trial court without having raised this point in the trial court. Hence the Illinois law of waiver or estoppel was applied.

Counsel cites other Illinois cases which are not before this Court either on the facts or on the law:

Moffat Coal Co. v. *Industrial Com.* (1947) 397 Ill. 196 (Pet. for Cert. p. 22); *The People* v. *Evans*, 262 Ill. 235 (Pet. for Cert. p. 22); and *The People* v. *Coal Belt Electric Railway Company*, 311 Ill. 29 (Pet. for Cert. p. 22).

Such cases do not hold that jurisdiction of the person could not be waived by failure to proceed in accordance with the routine procedure set up in a trial court, and that a party litigant could skip that routine procedure for objections below without being held on appeal to have

waived objections that were curable in the event such routine procedure had been followed.

The fact that neither defendant has shown that he or she was deprived of "due process of law" is not predicated on the claim that one of them was the wife of the other. *Robinson* v. *Robinson*, 329 Ill. App. 515 (Pet. for Cert. p. 12).

What Constitutes the Waiver.

It is not solely the fact of appeal which constitutes the waiver: It is the fact of appeal taken with the fact of not having proceeded in the court below to cure a curable defect which constitutes the waiver of an objection to the jurisdiction of the person as distinguished from jurisdiction of the subject matter. With such waiver or estoppel a money judgment for costs was proper and not unconstitutional. In none of the cases cited by the petitioners was that basic element of waiver or estoppel involved on the facts. (*Mead* v. *Mead*, 205 Ill. App. 327; *Bickerdike* v. *Allen*, 157 Ill. 95, 102; *Griffin* v. *County of Cook*, 369 Ill. 380, 387-8; *Harty* v. *Smith*, 74 Ill. App. 194; *G. A. Crancer Co.* v. *Williams*, 191 Ill. App. 451 (Pet. for Cert. pp. 18, 19).

Also in none of the United States Supreme Court cases cited was there a factual situation involved where a party was factually brought within a state court rule of law that a party litigant cannot keep silent in the trial court and then raise a curable defect on appeal for the first time without exposing himself to the law of waiver or estoppel or which says that such a state law is violative of the Fourteenth Amendment of the Federal Constitution. Thus *on the facts* are distinguished the cases of *Standard Oil Co.* v. *Missouri ex rel. Hadley*, 224 U. S. 270, 280 (Pet. for Cert. p. 17); *Shelley* v. *Kraemer*, 334 U. S. 1

(Pet. for Cert. p. 17); *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673 (Pet. for Cert. p. 17); *Twining* v. *New Jersey*, 211 U. S. 78 (Pet. for Cert. p. 16); *Scott* v. *McNeal*, 154 U. S. 34 (Pet. for Cert. p. 15).

CONCLUSION.

The Illinois law does not allow a party to stand by and allow her co-defendant to carry the burden of the trial, and then join with him in an appeal which raises all points which could be raised on the merits, and expect to get a hearing on appeal not only on such issues as have been raised on the merits but also to get a hearing on an objection which could have been cured if it had been urged in the trial court.

The salutary rule of state law which holds that a person who appeals without raising in the trial court a curable point, which could have been raised there prior to or at the time of such appeal with reference to jurisdiction of his or her person, must be held to have waived such point—does not deprive that person of "due process."

Were the law otherwise a party could thus procure a valuable postponement of the coercive sanction evidenced by the trial court's order for a writ of restitution to issue at the end of ten days from the date of the judgment (Abst. 7). Were the law otherwise, a party could have a court of appellate jurisdiction only (Illinois Constitution, Art. VI, Par. 11), go through a determination of the case on all the points raised on appeal on the merits under orderly procedures in the state court by which the case reached final determination and then upset such determination on a curable point which was not raised in the trial court.

The "due process" clause must be raised and was not raised at the first fair opportunity for Ruth Page Fisher to have raised an objection to jurisdiction of her person in

the trial court under established practices which supplied her with ample opportunity to make such objection there had she not wanted the undue advantage of postponement during the period that she sought in the Illinois Appellate Court to get the case reversed on the non-federal merits.

There was (1) no violation of the Fourteenth Amendment by application of the Illinois state law of waiver or estoppel and (2) in any event it has not been shown by the petitioners that the "highest court" of the state or any state court passed on the federal constitutional question or that the point was raised at the earliest opportunity by either petitioner.

Hence the petition for certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 461

RUTH PAGE FISHER and THOMAS HART FISHER,
Petitioners,

vs.

PRINTING DEVELOPMENTS, INC., a corporation,
Respondent.

Petitioners' Reply Brief

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I.

Was The Federal Question Raised In The State Court At The Earliest Fair Opportunity?

Respondent argues (p. 8-9) under Point I-(a) that Petitioners did not raise the Federal question in the State Court "at the earliest fair opportunity," upon the theory that the Federal question was not raised in either the Municipal Court or the intermediate Appellate Court, but was only raised in the Petition for Leave to Appeal in the Illinois Supreme Court, and (b) that the latter Court did not expressly pass upon it in denying the petition.

To this argument, Petitioners reply, *first*, that despite the usual rule that the Federal question must be raised in the State trial court, there is a well-recognized exception which is applicable to cases where (as in the case at bar) the issue over the denial of a Federal right is raised unexpectedly by the new and unanticipated act of the State Appellate or Supreme Court and, *second*, that when the Federal question so raised is asserted in an application for appeal to the State Supreme Court (as in the case at bar), then it makes no difference whether or not that Court in denying the application expressly passes upon the merits of the Federal question. These propositions are fully sustained by well-settled rules and decisions of this Court, as we shall now show.

(a) Whenever a litigant is surprised by a decision of any State court (whether trial, Appellate or Supreme) which first raises the Federal question, that is to say, whenever the litigant could not have reasonably anticipated that such State court would raise the Federal question, then it is sufficient for the litigant to assert the Federal question for the first time in the next higher State court on a further appeal thereto, following the "surprise" decision wherein the Federal question was born. As we shall show, below, the "surprise" decision was born in this case when the Illinois Appellate Court's judgment affirming the trial court judgment became final in the State Appellate Court.

The leading decision of this Court is *Saunders* v. *Shaw*, 244 U.S. 317, decided in 1917 in a unanimous opinion by Mr. Justice Holmes. In that case the Federal question (lack of due process under the 14th Amendment to the Federal Constitution) was not raised until *after* the Supreme Court of Louisiana had decided the case, the Fed-

eral question being first asserted by an assignment of errors filed by the appellant only one day before the Chief Justice of the Louisiana Supreme Court granted the writ of error to this Court. Mr. Justice Holmes held that the Federal question was raised in apt time, and said in his opinion (p. 320):

> "The record discloses the facts but does not disclose the claim of [Federal] right under the 14th Amendment until the assignment of errors filed the day before the chief justice of the state [Louisiana] granted this writ [of error]. Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court *done unexpectedly* at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. *The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance.* . . . It appears that shortly after the [Louisiana] Supreme Court had declined to entertain the petition for rehearing, the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of the state [Supreme Court] by his assignment of errors. We do not see what more he could have done.
>
> Judgment reversed." (Italics added.)

In other words, the appellant in this Court had properly raised the Federal question for the first time in the Supreme Court of Louisiana in his assignment of errors, after judgment.

Similarly, it is held in *Missouri* v. *Gehner*, 281 U.S. 313, 320, that the appellant is not "bound to anticipate" or "in advance to invoke" Federal protection of his constitutional and statutory rights under Federal law. As in the

Saunders case, this Court held that the assertion of the Federal questions for the first time in a motion for rehearing in the Missouri Supreme Court was sufficient, even though it did not pass upon the Federal questions in its ruling upon the motion for rehearing, citing the *Saunders* case.

Similarly, in *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, the Federal question was not raised until after the decision of the Missouri Supreme Court, at which time the petitioner filed a petition for rehearing. The Federal issue was the same as in the case at bar, namely, the deprivation of the right of petitioner to an opportunity to be heard and present his case and to defend his substantive right in the trial court. This was held to be adequate insofar as the time for raising the Federal question was concerned.

In *American Surety Co.* v. *Baldwin*, 287 U.S. 156 (cited and relied upon in Respondent's Brief (p. 11, 13)), a unanimous opinion by Mr. Justice Brandeis, the question was whether the deprivation of due process under the 14th Amendment was raised too late in a petition for rehearing in the Idaho Supreme Court. Although this Court held in that instance that the Federal question was asserted too late, this Court was careful to note (p. 164) the exception in such cases as *Saunders* v. *Shaw*, *Missouri* v. *Gehner*, and *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, *supra*, where the Federal claim arose from an unanticipated disposition of the case in the State Appellate or Supreme Court. This Court noted that the complaining party had actually invoked the parallel due process clause of the Idaho Constitution to that contained in the 14th Amendment to the Federal Constitution, as indicating that the complaining party was obviously not surprised by the decision of the Idaho Supreme Court.

Again, in *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358, a unanimous opinion by Mr. Justice Cardozo, the first time the Federal right under the 14th Amendment was raised was in a petition for rehearing in the Montana Supreme Court. This Court referred to the usual rule that a Federal question must be raised at the first opportunity and when raised for the first time in a petition for rehearing in the State Supreme Court usually comes too late, but carefully added (p. 367) that there is a well-recognized exception in cases "where the grounds of the decision [of the State Appellate or Supreme Court] supply a new and unexpected basis for a claim by the defeated party of the denial of a Federal right," citing the *Brinkerhoff, Missouri* and *American Surety Co.* cases, *supra.*

In the famous case of *Herndon* v. *Georgia*, 295 U.S. 441, the claim of Federal right to due process under the 14th Amendment was asserted for the first time in the Georgia Supreme Court by a motion for rehearing, which motion that Court refused to consider. The petitioner relied upon the exception to the general rule, claiming that the Federal question first arose from the unanticipated act of the Georgia Supreme Court. This Court confirmed the validity of the exception, saying (p. 444):

> "There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated", citing the *Saunders, Missouri, Brinkerhoff, American Surety Co.* and *Great Northern* cases, *supra.*

Applying the foregoing exception to the case at bar, it is plain that Petitioner, Ruth Page Fisher, could not possibly have raised the Federal question in the Municipal Court of Chicago, since she never appeared in that Court.

or participated in any proceedings therein prior to the entry of the final judgment for possession and money costs against her.

The Federal question was first raised in the case at bar in the Illinois Appellate Court, by its final decision overruling Petitioners' Petition for Rehearing. Therefore, until the Petitioners' application for rehearing was denied, which was the final decision in the Illinois Appellate Court, there was no opportunity for Petitioner, Ruth Page Fisher, to raise the Federal question in the Illinois State courts. Her first fair opportunity to assert the Federal question was in the Illinois Supreme Court and this is what she did.

As shown in our Petition in this Court (p. 11), Petitioner, Ruth Page Fisher, expressly raised and relied upon her constitutional rights under the due process clause of the 14th Amendment to the Federal Constitution at her first opportunity in her Petition for Leave to Appeal from the Illinois Appellate Court to the Illinois Supreme Court. We have quoted *verbatim* in our Petition (p. 11) Petitioners' language in which she asserted her right to due process under both the 14th Amendment to the Federal Constitution and Article II, Sections 2 and 5, of the Illinois Constitution in the Illinois Supreme Court.

(b) The fact that the Illinois Supreme Court in denying the Petition for Leave to Appeal did not expressly adjudicate or pass upon the Federal question is no barrier to this Court's granting the writ of certiorari in the case at bar. If this were not true, the State Supreme Court could destroy the Federal right merely by refusing to grant the appeal based thereon, even though the Federal question had been timely presented to the State Supreme Court, as in the case at bar.

As already noted above, this Court expressly held in the cases of *Missouri* v. *Gehner*, 281 U.S. 313; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673; and *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358, that it makes no difference whether the State Supreme Court does or does not pass directly in so many words upon the Federal question in denying the relief sought in that Court, *when the Federal question is timely presented to that Court, as in the case at bar.*

It is argued in Respondent's Brief (p. 8) that the Illinois Supreme Court must be assumed, "unless it can affirmatively be shown otherwise," to have denied the timely application for an appeal because of some "procedural difficulty". This begs the question, since it assumes that Petitioner's Federal right is NOT deprivation of the opportunity to be heard before judgment for possession and money costs was entered against her, but is something less which Respondent erroneously characterizes as a mere "procedural difficulty".

We conclude from what is said above that the first point in Respondent's Brief is without merit.

II.

Did Petitioner, Ruth Page Fisher, Waive Or Is She Estopped To Assert The Federal Question Because She Elected To Appeal From The Void Judgment Of The Trial Court, Instead Of Moving To Vacate The Void Judgment In The Trial Court?

Respondent's argument (p. 16) is that Petitioner, Ruth Page Fisher, "waived" and is "estopped" to assert her Federal right by her appeal from the void judgment against her for possession and money costs, without having first moved to vacate the void judgment in the Mu-

nicipal Court of Chicago. Respondent accuses her (p. 16) of keeping silent in the trial court (though she never appeared there) and then raising "a curable defect" on appeal for the first time.

The case of *American Surety Co.* v. *Baldwin*, 287 U.S. 156, cited in Respondent's Brief (p. 11, 13), expressly passed upon this very question. This Court held (p. 164) that a litigant is at liberty to invoke the Federal right to due process of law under the 14th Amendment by appealing to the State Supreme Court without first pursuing a different remedy in the State trial court provided by State procedure, and that it was only because the American Surety Company in that case had actually invoked the State remedy in the trial court and thereby lost its right to appeal to the State Supreme Court that the Federal right was lost.

This is clear from the fact that this Court said in its opinion (p. 169) in the *American Surety Company* case that the surety company, "Instead of moving to vacate [the State court judgment in the State trial court], it should have appealed directly to the State Supreme Court" for the precise reason that by moving to vacate the offending judgment in the trial court, the surety company had lost the timely opportunity to appeal to the State Supreme Court. We quote the entire language in the *American Surety Company* case (p. 169) as follows:

> "The opportunity afforded by state practice was lost because the Surety Company inadvertently pursued the wrong procedure in the state courts. *Instead of moving to vacate [the trial court judgment], it should have appealed directly to the state Supreme Court.* When later it pursued the proper course, the time for appealing had elapsed. The fact that its opportunity for a hearing was lost because misapprehension as to the appropriate remedy was not removed

by judicial decision until it was too late to rectify the error does not furnish the basis for a claim that due process of the law has been denied." (Italics added.)

Respondent argues (p. 12) that by moving to vacate the void judgment in the trial court, Petitioner, Ruth Page Fisher, *could* have cured the failure to obtain personal jurisdiction over her. As we have pointed out in our Petition (p. 10), she had to appeal from the void judgment *within five days* or lose the right of appeal and, in any event, if she had moved to vacate the void judgment, she would have voluntarily submitted herself to the future jurisdiction of the trial court. *Lord* v. *Hubert*, 12 Ill. (2d) 83, 87 (our Petition, p. 22).

This was exactly the situation in the *American Surety Company* case. If the warning in that case *not* to move to vacate the offending judgment in the trial court, but instead to appeal therefrom *before the right of appeal was lost*, was sound, then it is plain that Petitioner, Ruth Page Fisher, adopted *the only proper course* in appealing from the void judgment to the Illinois Appellate Court and later to the Illinois Supreme Court, instead of moving to vacate the void judgment and losing her right of appeal as well as submitting herself to the future jurisdiction in the trial court, exactly as this Court held in the *American Surety Company* case.

We conclude from what is said above that the second point in Respondent's Brief is without merit.

CONCLUSION.

We conclude that Petitioners have raised the question of Federal right at the earliest fair opportunity after they were surprised by the unanticipated decision of the Illinois Appellate Court, and that Petitioner, Ruth Page Fisher, has not "waived" her right, nor is she "estopped" to assert her right, to due process of law under the 14th Amendment.

It is respectfully prayed that this Court grant the prayer of our Petition and issue its writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 461

RUTH PAGE FISHER and THOMAS HART FISHER,
Petitioners,

vs.

PRINTING DEVELOPMENTS, INC., a corporation,
Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI, AND ACCOMPANYING MOTION FOR ISSUANCE OF WRIT OF CERTIORARI AND PEREMPTORY JUDGMENT OF REVERSAL WITHOUT ORAL ARGUMENT.

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PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI, AND ACCOMPANYING MOTION FOR ISSUANCE OF WRIT OF CERTIORARI AND PEREMPTORY JUDGMENT OF REVERSAL WITHOUT ORAL ARGUMENT.

Now come Ruth Page Fisher and Thomas Hart Fisher, Petitioners, by their attorneys, Horace A. Young and Norman Crawford, and petition the Court for a rehearing of their prior petition for writ of certiorari, and also move the Court for the issuance of a writ of certiorari and peremptory judgment of reversal without oral argument, upon the grounds set forth in their accompanying motion.

And in support of such petition and motion, the undersigned counsel for Petitioners hereby certify that such petition and motion are presented in good faith and not for delay, and that such petition and motion are restricted to substantial grounds not previously presented.

It is respectfully prayed that this Court grant the foregoing petition and motion.

Respectfully submitted,

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135 South La Salle Street
Chicago 3, Illinois

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 461

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MOTION FOR ISSUANCE OF WRIT OF CERTIORARI AND PEREMPTORY JUDGMENT OF REVERSAL WITHOUT ORAL ARGUMENT.

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MOTION FOR ISSUANCE OF WRIT OF CERTIORARI AND PEREMPTORY JUDGMENT OF REVERSAL WITHOUT ORAL ARGUMENT.

Now come Ruth Page Fisher and Thomas Hart Fisher, Petitioners, by their attorneys, Horace A. Young and Norman Crawford, and move the Court for the issuance of the writ of certiorari and peremptory judgment of reversal without oral argument; and in support thereof Petitioners respectfully show unto the Court as follows:

(1) This petition for writ of certiorari is sought to reverse a judgment of an Illinois state court, which judgment is utterly void for want of any jurisdiction in the trial court over the person of Petitioner, Ruth Page Fisher.

The Illinois Appellate Court on direct appeal itself correctly found that the trial court had never obtained any personal jurisdiction over such Petitioner. Nevertheless the trial court entered a void judgment for possession of real estate and for money costs against such Petitioner. The Illinois Appellate Court affirmed the void judgment *solely* upon the ground that such void judgment was rendered valid merely because such Petitioner had exercised an unquestioned right under Illinois law to appeal from such void judgment.

(2) There can be no doubt on the merits of the petition that such Petitioner has been deprived of due process of law thereby. This Court many times has held that the entry of a judgment in a State Court against a defendant which is utterly void for want of jurisdiction over the person of such defendant is a denial of due process of law under the 14th Amendment.

(3) Respondent's Brief does not present any issue on the merits. There is no basis for Respondent's contention that Petitioner, Ruth Page Fisher, did not raise the constitutional question at the earliest fair opportunity. Such Petitioner could not have raised it in the trial court. The constitutional question was first created when the Illinois Appellate Court's decision became final by denial of Petitioners' Petition for Rehearing. Petitioners raised the constitutional question in the Illinois Supreme Court which was their first fair opportunity.

(4) Respondent's contention that Petitioner should not have appealed from the void judgment within the five days granted by Illinois law, but instead was required to move in the trial court to vacate the void judgment within 30 days and thereby lose the right of appeal, is contrary to the precise holding on this identical point by this Court in *American Surety Company* v. *Baldwin*, 287 U.S. 156.

(5) No oral argument is required to demonstrate that the void judgment of the Illinois State Court should be reversed peremptorily. In such cases, this Court may properly grant the writ of certiorari as prayed and may dispose of the case by a *per curiam* opinion without oral argument.

Respectfully submitted,

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